No. 93-609

In the Supreme Court of the United States

OCTOBER TERM, 1993

MORGAN STANLEY & CO., INCORPORATED, ET AL.,
PETITIONERS

v.

PACIFIC MUTUAL LIFE INSURANCE CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78aa-1(b) (Supp. IV 1992) which provides for the reinstatement, on motion by the plaintiff, of certain private actions under Section 10(b) of the Exchange Act that were dismissed as untimely under *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), violates the separation of powers doctrine or the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A33, is reported at 997 F.2d 39. The opinion of the district court, Pet. App. B1-B15, is reported at 806 F. Supp. 108.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1993. The petition for a writ of certiorari was filed on October 18, 1993, and was granted on January 10, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution and the Fifth Amendment to the Constitution are reproduced in pertinent part in the appendix to petitioner's brief. Pet. Br. App. A. Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. IV 1992), is reproduced in the appendix to this brief. App., *infra*, 1a.

STATEMENT

1. In March 1991, respondent Pacific Mutual Life Insurance Company (Pacific Mutual) filed a securities fraud action against petitioners in the United States District Court for the Northern District of Texas. The complaint alleged claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1988) (Exchange Act), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, as well as pendent common law fraud claims. Pacific Mutual's claims arose out of securities transactions that occurred in July and September 1987, approximately three and one-half years before it filed suit. Pet. App. A3, B2.

At the time Pacific Mutual brought suit, the Exchange Act did not contain a statute of limitations expressly applicable to its claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Fifth Circuit, like a number of other courts of appeals, had held that private Section 10(b) actions were subject to limitations periods borrowed from state law. See, *e.g.*, *In re Sioux, Ltd., Securities Litigation* v. *Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). The applicable Texas statute of limitations subjected Pacific

Mutual's claims to a four-year limitations period. Accordingly, petitioners did not contest the timeliness of the action. Pet. App. A3.

On June 20, 1991, while the instant action was pending before the district court, this Court issued its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf* rejected the practice adopted by most circuits of borrowing state limitations periods and held that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under Section 9(e), a suit must be commenced no more than one year after the fraud is discovered and no more than three years after it occurs. 111 S. Ct. at 2782. Having adopted that new limitations period for Section 10(b) actions, the Court applied the rule to the parties in *Lampf* itself. See *id.* at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting).

On the same day that *Lampf* was decided, this Court also issued its decision in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). Under *Beam*, if the Court in a civil case applies a new interpretation of the law in the decision that announces it, courts must apply that interpretation of law to all other pending cases, even if the change in interpretation was not foreseeable and the parties had reasonably relied on prior judicial interpretations. The effect of *Beam* was to make applicable to all pending Section 10(b) actions *Lampf*'s view of the governing limitations period, whether or not the plaintiffs in those cases had relied on settled precedents establishing longer limitations periods.

Shortly after the decisions in *Lampf* and *Beam* were issued, petitioners moved for dismissal of Pa-

cific Mutual's complaint on the ground that the federal securities claims were now untimely. On August 16, 1991, the district court dismissed the federal claims with prejudice under *Lampf*, and dismissed the common law fraud claims without prejudice. J.A. 1-2. Because the federal claims were plainly untimely under *Lampf*, Pacific Mutual did not appeal the dismissal of those claims.[1] Pet. App. A4.

2. In December 1991, four months after the dismissal of this action, Congress added Section 27A, 15 U.S.C. 78aa-1 (Supp. IV 1992), to the Exchange Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A represents an effort by Congress to protect victims of federal securities fraud who filed suit within the limitations periods set by pre-*Lampf* precedents, but whose suits were retroactively rendered untimely by the Court's decisions in *Lampf* and *Beam*.

Section 27A applies to private Section 10(b) actions that were commenced before June 20, 1991, the date that *Lampf* and *Beam* were decided. With respect to such actions, Section 27A provides that the limitations period "shall be the * * * period provided by the laws applicable in the jurisdiction * * * as such laws existed on June 19, 1991," the day before *Lampf* was decided. 15 U.S.C. 78aa-1(a) (Supp. IV 1992). In jurisdictions (such as the Fifth Circuit) that applied a longer limitations period before *Lampf*, Section 27A has the effect of changing the governing law by substituting the longer limitations period for the "1-and-3" period that was borrowed in *Lampf* from Section 9(e).

[1] Pacific Mutual did, however, refile the common law fraud claims in state court. J.A. 15 n.4.

When Section 27A became law, many of the actions that were rendered untimely under *Lampf* were still pending in the federal system, either in the district courts or on appeal. Those cases are addressed by Section 27A(a), which is not at issue in this case.[2] Some suits, however, had been dismissed on the basis of *Lampf* and had not been appealed within the 30-day time limit imposed by Congress on private civil appeals. See 28 U.S.C. 2107(a) (Supp. IV 1992). To account for such cases, Congress enacted Section 27A(b), the provision at issue here.[3]

[2] The courts of appeals have uniformly sustained the constitutionality of Section 27A(a), which applies to cases pending at the time of its enactment. See *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993), petition for cert. pending, No. 93-564 (filed Oct. 12, 1993); *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Cooke* v. *Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Berning* v. *A.G. Edwards & Sons*, 990 F.2d 272 (7th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993).

[3] Petitioners' amici suggest (Spendthrift Farm, Inc., et al., Amici Br. 25-28) that Section 27A(b) was not intended to apply to cases, like this one, that had been dismissed and were not pending on appeal. That suggestion, which petitioners have not joined, cannot be squared with the language of Section 27A(b). Section 27A(b) applies to "[*a*]*ny* [*pre-Lampf*] private civil action implied under section [10(b)] * * * which was dismissed as time barred" following *Lampf*. 15 U.S.C. 78aa-1(b) (Supp. IV 1992) (emphasis added). It contains no language limiting its reach to actions that had been dismissed but were pending on appeal. If Congress had wished to confine the scope of Section 27A in the fashion suggested by the amici, it could have dispensed with subsection (b) altogether,

Section 27A(b) provides a mechanism for the reinstatement of actions that had been "dismissed as time barred" following this Court's decision in *Lampf*. 15 U.S.C. 78aa-1(b) (Supp. IV 1992). During a 60-day period beginning on December 19, 1991, the date of Section 27A's enactment, plaintiffs whose suits had been the subject of such dismissals could file motions seeking reinstatement. A district court presented with a reinstatement motion under Section 27A(b) must consider the timeliness of the suit by applying "the limitation period provided by the laws applicable in the jurisdiction" before *Lampf*. 15 U.S.C. 78aa-1(b) (Supp. IV 1992). If the court determines that the suit is timely under that limitations period, the suit is reinstated; if the court determines that the suit remains untimely, the motion for reinstatement is denied.

3. In January 1992, within the 60-day period prescribed by Section 27A(b), Pacific Mutual moved to reinstate its federal securities claims. Pet. App. A5. In July 1992, the district court denied the reinstatement motion on the ground that Section 27A(b) is unconstitutional. *Id.* at B1. The district court held that Section 27A(b) violates the separation of powers doctrine by reopening final judgments of federal courts. *Id.* at B5-B15.

Pacific Mutual appealed. The court of appeals consolidated that appeal with the appeal from another district court decision that had held Section 27A(b) unconstitutional,[4] and the United States intervened

since there would have been no need to provide a separate reinstatement mechanism for plaintiffs whose cases were pending on appeal.

[4] *TGX Corp.* v. *Simmons*, No. 92-3375 (5th Cir. July 20, 1993), petitions for cert. pending *sub nom. BDO Seidman* v. *Simmons*, No. 93-313 (filed Aug. 26, 1993), and *Continental Insurance Co.* v. *Simmons*, No. 93-611 (filed Oct. 18, 1993).

in both appeals, pursuant to 28 U.S.C. 2403, to defend the constitutionality of Section 27A(b).[5] Pet. App. A8. The Securities and Exchange Commission, as amicus curiae, also supported the constitutionality of Section 27A(b).

The court of appeals reversed, rejecting all constitutional challenges to Section 27A(b). Pet. App. A13-A33. The court held that neither the separation of powers doctrine nor the Due Process Clause of the Fifth Amendment prohibits Congress from creating a statutory mechanism for reinstating previously timely suits that were dismissed as untimely under *Lampf*. Pet. App. A13-A28.

SUMMARY OF ARGUMENT

I. Section 27A(b) of the Securities Exchange Act of 1934 does not violate the separation of powers doctrine. While it has long been established that the decisions of Article III courts are not subject to review and reversal by another branch and that Article III courts may not be assigned the nonjudicial function of making advisory recommendations to other branches, Section 27A(b) infringes neither of those constitutional concerns. Section 27A(b) does not place the Legislative or Executive Branch in the role of reviewing the merits of the decisions of federal courts, and it does not reverse the holdings of federal

[5] When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, 28 U.S.C. 2403(a) directs the court to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality."

courts. Nor does Section 27A(b) convert judicial decisions into nonbinding recommendations.

In Section 27A(b), Congress legislated a new statute of limitations for the class of securities fraud cases that had been dismissed in light of this Court's adoption of a new (and in many cases shorter) federal limitations period for implied Section 10(b) claims. Congress also provided a procedural vehicle for reinstating dismissed cases in order for the new law to be applied by the courts. Congress's actions were an exercise of legislative, not judicial, power. The provision is no different in effect than the creation of a new federal cause of action with a longer statute of limitations, an approach that raises no Article III concerns. And, under Section 27A(b), courts have only judicial functions to perform: the application of law to fact in particular cases and the rendering of final judgments on the merits. Accordingly, Section 27A(b) respects the division between legislative and judicial functions that the Constitution requires.

II. Section 27A(b) does not violate the Due Process Clause. Under this Court's jurisprudence, economic legislation that impinges on property interests is constitutional if it is reasonably related to a legitimate government interest. The notion that "vested rights" in a judicial judgment are immune to government regulation finds no support in modern cases, which recognize that Congress may affect property interests through retroactive, as well as prospective, legislation. The Court has specifically rejected the claim that rights represented by a judgment, alone of all property rights, are not subject to reasonable regulation. Here, Section 27A(b) is justified because it is a reasonable measure to protect the in-

terests of victims of securities fraud whose cases retroactively became untimely.

Even if Section 27A(b) were analyzed under older decisions describing a "vested rights" doctrine, however, the provision is constitutional. This Court's vested rights cases have always acknowledged that a legislature may provide for further judicial review of a judgment, even after the time for appeal has run. And those cases further hold that it does not violate due process for the legislature to provide new substantive rules of decision for application in the new review proceedings. Those cases establish that the concept of "vested rights" does not invalidate provisions, like Section 27A(b), that provide that for further review of a claim, notwithstanding a prior judgment, in light of new substantive law.

ARGUMENT

SECTION 27A(b) OF THE SECURITIES EXCHANGE ACT OF 1934 IS CONSTITUTIONAL

I. SECTION 27A(b) DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

Section 27A provides a mechanism for reinstatement of a limited class of securities fraud cases based on an application of a change in the governing statute of limitations; it does not adjudicate the timeliness of those actions under the revised law, and it does not dictate the ultimate judgments to be rendered. Nevertheless, relying on principles announced in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), petitioners contend (Pet. Br. 11-29) that Section 27A(b) crosses the constitutional line that separates the legislative power under Article I from the judicial power under Article III. Section 27A(b), however, does not raise the Article III concerns consid-

ered in *Hayburn's Case*. Section 27A neither involves an attempted exercise of the judicial power by another Branch of the government, nor requires the federal courts to exercise the non-judicial function of rendering a decision subject to review in another Branch. Accordingly, Section 27A(b) fully respects the separation of powers under the Constitution.

A. The Principles of *Hayburn's Case* Identify The Requirements For An Independent Judiciary

The basic separation of powers principles invoked by petitioners trace their source to *Hayburn's Case*, which involved the administration of a pension statute for disabled Revolutionary War veterans. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. Under that statute, the circuit courts created by the Judiciary Act of 1789 were directed to examine pension applicants to determine the nature and degree of their disability, and to "transmit the result of their inquiry" to the Secretary of War, if "in their opinion, the applicant should be put on the pension list." § 2, 1 Stat. 244. The Secretary of War, in turn, was authorized to "withhold the name of such applicant from the pension list, and make report * * * to Congress," in any case in which he had "cause to suspect imposition or mistake." § 4, 1 Stat. 244. The statute thus subjected a circuit court's ruling that an applicant should be put on the pension list to revision and reversal by the Secretary of War.

Hayburn's Case itself became moot before this Court had occasion to address the constitutionality of the pension statute. See 2 U.S. (2 Dall.) at 408; Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (repealing challenged provision). Five of the six Justices of this Court, however, expressed their views on the statute

in their capacity as circuit judges.[6] Those views, which are collected in the report of *Hayburn's Case*, 2 U.S. (2 Dall.) at 410-414, "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." *Morrison* v. *Olson*, 487 U.S. 654, 677 n.15 (1988).

All of the Justices who considered the statute stated that the Constitution did not authorize review and revision of the judgments of federal courts by the Executive or Legislative Branch. Chief Justice Jay and Justice Cushing stated that "by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." 2 U.S. (2 Dall.) at 410. Justices Wilson and Blair likewise concluded that the "revision and controul" of judicial judgments by the Executive and Legislative Branches conflicted "with the independence of that judicial power which is vested in the courts." *Id.* at 411. And Justice Iredell concluded that "no decision of any court of the United States can, under any circumstances * * * agreeable with the Constitution, be liable to a revision, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested." *Id.* at 413.

The opinions in *Hayburn's Case* reflect two related Article III concerns. First, because Article III, Sec-

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[6] Circuit courts for the districts of New York, Pennsylvania, and North Carolina addressed the validity of the law, and each panel wrote letters to the President to express their views. See Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527, 529-534.

tion 1 vests "the judicial Power" exclusively in the federal courts, neither Congress nor the Executive Branch may, in the words of Chief Justice Jay, act as a "court of errors," *Hayburn*, 2 U.S. (2 Dall.) at 410, by reviewing the judgments of Article III courts. Second, Article III precludes the federal courts themselves from carrying out "any duties, but such as are properly judicial * * *." *Ibid.* Because "the judicial Power" reposed in the courts by Article III contemplates the power to render final judgments that are conclusive of the parties' rights, see *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 457 (1899), a statute like the one in *Hayburn's Case*, which called on Article III courts to make nonbinding determinations, requires the courts to play a role that "is not judicial."[7] *Hayburn*, 2 U.S. (2 Dall.) at 410.

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[7] In *Hayburn's Case*, Chief Justice Jay and Justice Cushing construed the statute as an invitation to federal judges to "execute this act in the capacity of commissioners," 2 U.S. (2 Dall.) at 410, on the theory that individual members of the federal judiciary may carry out non-Article III responsibilities by accepting appointment to nonjudicial offices. The other Justices declined to exercise the jurisdiction conferred by the statute, *id.* at 411-414, and Chief Justice Jay and Justice Cushing later concluded that the statute did not authorize them to act as commissioners. See *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 49-50, 52-53 (1851) (discussing *Hayburn's Case* and the Court's subsequent consideration of the same statute in the unreported decision of *United States* v. *Yale Todd* (1794)). While inviting or requiring Article III judges to serve as commissioners might raise the question whether that assignment is consistent with Article III, cf. *Mistretta* v. *United States*, 488 U.S. 361, 402-404 (1989), that issue was not examined in *Hayburn's Case* and is not at issue here. Nor does this case implicate the Article III concerns raised when Congress assigns adjudicatory responsibilities to non-Article III tribunals in the first instance. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

B. Section 27A(b) Does Not Offend the Separation of Powers Principles of *Hayburn's Case*

When the concerns underlying *Hayburn's Case* are borne in mind, it becomes clear that Section 27A(b) does not violate the separation of powers doctrine. Section 27A neither places a non-Article III "court of errors" in review of decisions rendered by Article III courts, nor requires federal courts to carry out functions that are not "judicial" in character. Thus, the requirements of independent judicial decision-making voiced in *Hayburn's Case* are not threatened by Section 27A(b).

1. In enacting Section 27A, Congress did not exercise the "judicial Power" conferred on the Article III courts by "sit[ting] as a court of errors," *Hayburn's Case*, 2 U.S. (2 Dall.) at 410, to review the validity of judicial judgments under existing rules of decision. Instead, Congress acted in a quintessential exercise of its "legislative Power," Art. I, § 1, by passing a law that prescribes a new rule of decision to be applied by the courts. See *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407, 1413, 1414 (1992). Section 27A(b) changes the limitations periods for pre-*Lampf* Section 10(b) cases, provides a vehicle for application of that law to dismissed cases, and leaves the judicial function of applying the new limitations periods to the courts. Section 27A(b) is thus fundamentally different from the pension statute in *Hayburn's Case*. That law prescribed a single set of legal standards regarding eligibility for military pensions, but authorized the Secretary of War to overturn the

decisions of federal courts if the Secretary had cause "to suspect imposition or mistake" in the court's determinations. That form of executive review of judicial action constitutes impermissible oversight—an effective exercise of the "judicial Power"; Section 27A does not.

It would be one thing if Congress had reviewed the application of the *Lampf* statute of limitations in individual cases, and had directed the federal courts to reopen otherwise final judgments simply because it disagreed with the courts' determinations.[8] But it is quite another thing for Congress to provide a judicial remedy that requires the reopening of a judgment in order for the court to apply a newly legislated statute of limitations. Establishing a procedural avenue to have a new legal standard applied to a case is a legislative, not a "judicial," function. *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833) (statute authorizing court to "reverse and annul any prior decree or adjudication" that is found to rest on forged evidence, whether or not the prior judgment was final and conclusive between the parties, "is in no respect the exercise of judicial powers").[9]

[8] Whether such a congressional determination would properly be characterized as an exercise of judicial, rather than legislative, power is not at issue here. Cf. *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 395, 398 (1798).

[9] *Sampeyreac* involved a prior judgment of a territorial court, not a court exercising Article III power. The Court's conclusion, however, that the statute at issue did not constitute an exercise of judicial power by Congress, but simply provided a new legal remedy, did not turn on the nature of the tribunal whose decision was retroactively made subject to further review. It turned, rather, on the nature of the statute at issue. 32 U.S. (7 Pet.) at 237-239.

Petitioners assert that Section 27A(b) "is not 'legislative' in any meaningful sense" (Pet. Br. 26) because it does not create a new limitations period for future Section 10(b) suits, but applies only retroactively. The "legislative Power" that Article I grants to Congress, however, encompasses the power to legislate retroactively. See, *e.g.*, *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2286-2287 (1993); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Nothing in Article I restricts Congress from giving legislation solely retroactive effect when the problem that Congress seeks to remedy is itself solely a retrospective one.[10]

Here, the most urgent problem faced by Congress was the retrospective impact of *Lampf* on plaintiffs who had relied on prior decisional law in filing securities actions that later were rendered untimely by *Lampf*. When Congress acted, some plaintiffs were

[10] Article I does contain one provision concerning purely retroactive legislation, the prohibition against ex post facto laws. Art. I, § 9, Cl. 3. But that prohibition, far from aiding petitioners' argument, actually undermines it. The adoption of the Ex Post Facto Clause implies that the power to legislate purely retroactively is within the scope of the "legislative Power" under Article I, since if retroactive legislation were not otherwise authorized by Article I, the ban would have been unnecessary. And the decision of the Framers to proscribe only a single class of retroactive legislation in Article I (namely, ex post facto laws) implies that the Framers did not intend for Article I to preclude the enactment of retroactive laws in other cases. Petitioners do not claim that Section 27A is itself an ex post facto law within the meaning of Article I, since the Ex Post Facto Clause applies only to criminal legislation. See, *e.g.*, *Galvan* v. *Press*, 347 U.S. 522, 531 n.4 (1954); *Calder* v. *Bull*, *supra*.

facing motions to dismiss based on *Lampf*; others had lost in district courts and had appealed; still others had received dismissal orders and had concluded that, in light of *Lampf*, an appeal would be frivolous. In all of those cases, *Lampf*'s retroactive application caused results that Congress perceived to be unfair. Legislation aimed at redressing that unfairness was necessarily retrospective. No decision of this Court suggests that, in these circumstances, retrospective legislation is anything other than an exercise of the "legislative Power" conferred on Congress by Article I.[11]

2. Nor does Section 27A(b) require federal courts to play a role that "is not judicial." *Hayburn's Case*, 2 U.S.C. (2 Dall.) at 410. The task assigned to district courts by Section 27A(b) is a fundamentally judicial one—that of applying a legal rule (the statute of limitations) to a controversy between the parties. It is for the courts, not Congress, to determine the effect of the legal rule in the circumstances of a particular case. Nothing in Section 27A(b) precludes courts from denying reinstatement in individual cases, if it determines either that "the law[] appli-

[11] Petitioners cite *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 370-371 (1989) (*NOPSI*), and *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210, 226 (1908), for the proposition that legislation necessarily "looks to the future." Pet. Br. 27 & n.30. Neither *NOPSI* nor *Prentis* involved the scope of the legislative power under Article I. The quoted language addressed a wholly different issue, the characterization of state administrative proceedings for purposes of federal abstention doctrines. Petitioners also rely (Pet. Br. 27 n.30) on language in *Koshkonong* v. *Burton*, 104 U.S. (14 Otto) 668, 678-679 (1881), suggesting that legislation must operate only on future transactions. As we have noted, that suggestion does not accord with current law.

cable in the jurisdiction" before *Lampf* provides the same limitations period adopted in Lampf, or that the suit was untimely even under a different limitations period. And, if the court finds the suit timely, Section 27A(b) has no effect on the way a court will resolve the merits of the securities fraud claim itself. The ultimate judgment to be rendered remains within the control of the judiciary.[12]

Section 27A(b) does, of course, require courts to reinstate cases that have been dismissed, if they have first determined that the suits are timely under the new limitations period prescribed by Congress. But the provision of a reopening remedy does not infringe the courts' authority to render binding determinations in the sense required under *Hayburn's Case*. The prior determination of the district court in this case was that the statute of limitations, as announced by *Lampf*, barred this action. Congress has not "re-

[12] Petitioners thus err when they argue that Section 27A(b) represents a "greater intrusion on the role and right of the judiciary" than was present in *Hayburn's Case* because Section 27A(b) *"mandates* the automatic resuscitation" of cases, while the statute in *Hayburn's Case* "merely permitted" the Executive Branch to invalidate judicial decisions. Pet. Br. 16-17. Section 27A(b) does not "mandate" a change in a judgment, for if an action is untimely under the pre-*Lampf* statute of limitations, Section 27A(b) has no effect on the judgment at all. Whether the judgment is reopened depends on whether the new rule of decision (*i.e.*, pre-*Lampf* law with respect to the timeliness of the suit) requires that result on the facts of a particular case. It is difficult to understand how a statute that allows the Executive or Legislative Branch to revise decisions on a case-by-case basis (*Hayburn's Case*) is less offensive to separation of powers principles than a statute under which Congress does not select individual cases for review, and makes no effort to prescribe the outcome of any individual case.

viewed" or "reversed" that conclusion under the rule of *Lampf*, as might a "court of errors." Rather, Congress has simply required that an action be reinstated if the new statute of limitations is satisfied, and then to adjudicate the case on the merits.[13]

Section 27A is no different in effect than the creation of a new right of action that duplicates the elements of Rule 10b-5, but that contains a new, and longer, statute of limitations. Such a statute would raise no Article III concerns. It might be objected that the new right to sue overrides principles of res judicata. But res judicata is not of Article III dimension in this setting. Particularly where a prior judgment rested solely on the statute of limitations, without adjudication of the substantive claim, Congress is free to determine that the interest in having a claim heard on the merits overrides the equities and practical considerations that normally favor repose. And when the defense of res judicata is removed from the case, the courts cannot decline to hear a case by invoking Article III. See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 406-407 (1980).[14]

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[13] Accordingly, petitioners are incorrect in suggesting (Pet. Br. 23) that Section 27A(b) violates Article III's prohibition against advisory opinions. A judgment is not rendered "advisory" in the Article III sense when a court is obligated to revise it as a consequence of legislation enacted *pendente lite*, see *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and it is not rendered advisory when the parties' legal rights are altered by legislation enacted after the litigation, see *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (13 How.) 421, 431 (1855).

[14] This Court has described res judicata as a "common law doctrine[]," and has stated that "[c]ourts do not, of course,

In *Sioux Nation*, this Court rejected a separation of powers attack on a statute requiring the Court of Claims to entertain, "without regard to the defense of res judicata," an application by the Sioux Nation for further review of a takings claim that had previously gone to final judgment in favor of the United States. 448 U.S. at 391. The Court explained:

> When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills [takings] claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were there in pursuit of judicial enforcement of a new legal right.

Id. at 406-407.[15] That reasoning establishes that a statute creating "a new legal right" to sue for secu-

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have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand." *Astoria Federal Savings and Loan Assoc.* v. *Solimino*, 111 S. Ct. 2166, 2169 (1991). Res judicata (like the statute of limitations) must be raised as an affirmative defense in the federal courts. Fed. R. Civ. P. 8(c). It has never been thought that, when a defendant does not raise the defense of res judicata, Article III requires a federal court to conduct an independent inquiry into whether a federal court judgment was previously entered with respect to the same claim.

[15] *Sioux Nation* cannot be distinguished on the ground that Congress, in the exercise of its power to pay the Nation's debts, can waive the res judicata effect of a judgment that rejects a claim against the United States. Pet. Br. 24. The reasoning of *Sioux Nation* is equally applicable when Congress lifts the bar of res judicata in the exercise of some other

rities fraud, with an extended statute of limitations, would not infringe the Article III power of the courts to render final judgments. Yet such a statute would have the same consequences for the judicial system as does Section 27A(b). Congress's choice to employ the procedural route of requiring reinstatement of a case does not violate the separation of powers.

C. Section 27A(b) Does Not Conflict With The Historical Understanding Or Later Implementation of Article III

1. In addition to invoking the principles of *Hayburn's Case*, petitioners contend that Section 27A(b) is at odds with the historical underpinnings and original understanding of Article III. Pet. Br. 12-15; see Amici Br. 5-12. They note that legislatures during the period leading to the adoption of the Constitution often intervened in judicial proceedings, and they argue that Article III embodies a conscious goal

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constitutionally granted power. The source of Congress's power to override the defense of res judicata cannot be determinative of the question whether Article III is violated by a requirement that a court readjudicate a claim. For if res judicata were compelled by Article III to safeguard the structural independence of the courts, the doctrine would not be subject to waiver by *any* party litigant. See *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 850-851 (1986) (noting that Article III, § 1, "safeguards the role of the Judicial Branch in our tripartite system" by "preventing the encroachment or aggrandizement of one branch at the expense of the other"; holding that when that "structural principle [of Article III] is implicated in a given case, the parties cannot by consent cure the constitutional difficulty," because "the limitations serve institutional interests [of the courts] that the parties cannot be expected to protect").

of precluding intervention by Congress in the affairs of the federal judiciary.

The historical record cited by petitioners surrounding the adoption of Article III gives little insight into how the Framers would have viewed a provision like Section 27A(b). Indeed, it stands for a good deal less than petitioners claim. For example, petitioners assert (Pet. Br. 14) that Charles Pinckney proposed congressional review of judicial decisions involving interstate disputes, and that the Constitutional Convention demonstrated its hostility to the idea of legislative review when it rejected Pinckney's proposal. But Pinckney's plan did not, in fact, call for Congress to review judicial decisions. Instead, the plan provided for interstate disputes to be resolved by specially appointed courts, whose judgments, far from being subject to congressional review, were explicitly made final and conclusive.[16] Con-

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[16] In his prepared remarks accompanying the introduction of his plan, Pinckney explained that he was proposing the same mechanism for resolving interstate disputes that was used in the Articles of Confederation. III M. Farrand, *Records of the Federal Convention* 117 (1966) (Pinckney). The Articles provided for States to resolve jurisdictional or territorial disputes by appointing "commissioners or judges to constitute a court for hearing and determining the matter in question." Articles of Confederation, Art. IX, ¶ 2; see P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 4 n.17 (3d ed. 1988). While the provision referred to Congress as the "last Resort on Appeal," it did not in fact provide for Congress to review the court's decision. Instead, Congress's role in this scheme was limited to: (1) notifying the second State that the first State was invoking the procedure; and (2) appointing the judges if the States were unwilling or unable to agree on the composition of the court. *Ibid.* Congress did

gress's rejection of Pinckney's proposal therefore says nothing about the Framers' views regarding the effect of legislation on judicial decisions.[17] To our knowledge, at no point did the Convention ever specifically address that issue.

While the Framers did, more generally, condemn legislative usurpation of judicial authority, the argument against such action was not always clearly cast in constitutional terms. For example, petitioners invoke (Pet. Br. 15) Alexander Hamilton's statement in *The Federalist* that "[a] legislature, without exceeding its province, cannot reverse a determination once made in a particular case * * *." *The Federalist Papers* No. 81, at 484 (C. Rossiter ed. 1961). Yet in the same paragraph Hamilton stated: "Nor is

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not exercise any "appellate" role; to the contrary, the judgment of the court was expressly made "final and conclusive." *Ibid.* Pinckney proposed carrying over this mechanism into the new Constitution. See III M. Farrand, *supra*, at 117 (Pinckney) ("The 9th article [of the Pinckney plan] respecting the appointment of Federal Courts, for deciding territorial controversies between different States, is the same with that in the [Articles of] Confederation."). The proposal was referred to the Committee of Detail, which produced a draft that reproduced the corresponding provisions of the Articles of Confederation almost verbatim. See II M. Farrand, *supra*, at 170, 183-184.

[17] The Convention rejected Pinckney's proposal in favor of placing interstate disputes in the original jurisdiction of the Supreme Court. See II M. Farrand, *supra*, at 400-401. The record of the Convention's debates indicates that the Pinckney proposal was thought to have been "rendered unnecessary by the National Judiciary now to be established" under Article III. *Id.* at 401. Pinckney himself had suggested as much when he first offered his proposal. See III M. Farrand, *supra*, at 117 ("this may with propriety to be left to the Supreme Judicial").

there any thing in the proposed Constitution * * * by which it is forbidden." *Ibid.* In Hamilton's view, "the impropriety of the thing, on the general principles of law and reason," not the Constitution, "is the sole obstacle." *Ibid.*

Nevertheless, it may be assumed the Framers intended the Constitution to insulate the actions of federal courts from *improper* interference by Congress. The question, however, is whether Section 27A(b) constitutes such an improper interference. The historical examples that excited the Framers' attention were far more intrusive than and quite different from Section 27A(b), because they were indistinguishable from the powers exercised by the courts themselves. See, *e.g.*, *The Federalist Papers*, No. 48, at 311-312 (J. Madison) (C. Rossiter ed. 1961) (describing practice of Virginia and Pennsylvania legislatures of "determin[ing]" cases and "decid[ing] rights that "should have been left to *judiciary controversy*"); Edward S. Corwin, *Court Over Constitution* 13-14 (1938) ("In 1787 judicial interpretation of the law was often not final even in the decision of cases, it being common practice for the legislature, in the exercise of a species of equity jurisdiction, to reverse decisions of the ordinary courts, to order cases retried or appeals granted, and even to adjudicate controversies itself."); *INS* v. *Chadha*, 462 U.S. 919, 961-962 (1983) (Powell, J., concurring) (describing historical examples of "trial by legislature," in which individuals' rights were determined in particular controversies by the state legislatures, and suggesting that it was "to prevent the recurrence of *such abuses* that the Framers vested the executive, legislative, and judicial powers in separate branches") (emphasis added). Those examples

are not comparable to the reopening remedy provided by Section 27A(b).

Indeed, a provision requiring the reopening of an otherwise final judgment in particular circumstances has long been part of federal law, and it has never been suggested that this provision violates the Constitution. 28 U.S.C. 1655 provides that a defendant who is not personally served (but is served by publication) in an action to enforce or to remove a lien upon title to real or personal property may, within one year after final judgment, "enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just." Under that provision, "an absent defendant who fails to appear and who was not personally served * * * can as of right have the judgment vacated within the year." *Equitable Life Assurance Society* v. *United States*, 331 F.2d 29, 37 (1st Cir. 1964). In *Perez* v. *Fernandez*, 220 U.S. 224 (1911), this Court enforced the predecessor of Section 1655.[18] The Court held that "the statute, without ambiguity, confers the right to have the case reopened wherever the jurisdiction of the court has rested upon publication." 220 U.S. at 231. The Court gave no suggestion that the statutory

[18] By the Act of Mar. 3, 1875, ch. 137, § 8, 18 Stat. 472, when a defendant was not given notice by personal service (but was served by publication) in an action to enforce or to clear a lien upon title to real or personal property, the defendant could enter an appearance within one year "and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein * * * and thereupon said suit shall be proceeded to final judgment according to law." See *Perez*, 220 U.S. at 229.

mandate that a final judgment be set aside violates the Constitution.[19]

Furthermore, Fed. R. Civ. P. 60(b), discussed at pages 34-35, *infra*, embodies longstanding principles providing for the setting aside of the final judgment of a federal district court in appropriate circumstances. Rule 60(b) and its historical antecedents reflect considerable development, over time, of the circumstances in which judgments may, and should, be set aside. See 7 James W. Moore, *Moore's Federal Practice* ¶¶ 60.09-60.27, at 60-65 to 60-306 (1993); see also 50 U.S.C. App. 520(4) (provision for setting aside judgments under Soldiers and Sailors Civil Relief Act). Article III does not bar Congress from identifying additional such circumstances and requiring, rather than permitting, relief from a judgment when, in its view, equitable considerations comparable to those that animated Rule 60(b) and its historical antecedents warrant that relief.

2. Because Section 27A does not threaten the separation of powers principles articulated in *Hayburn's Case*, it is not surprising that none of this Court's decisions applying those principles, see Pet. Br. 17-19, casts doubt on the constitutionality of Section 27A. The statutes at issue in most of those

[19] Section 1655 is not distinguishable on the theory that due process compels the reopening of a judgment when personal service has not been provided; publication is a constitutionally adequate means of giving notice when "it is not reasonably possible or practicable to give a more adequate warning." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950). Rather, Section 1655 is explicable solely as a response to equitable concerns perceived by Congress to weigh against the finality of a judgment—the same motives that prompted the enactment of Section 27A.

cases, unlike the one in *Hayburn's Case* itself, provided for executive or legislative review of decisions of *non*-Article III tribunals. See *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); *Gordon* v. *United States*, 69 U.S. (2 Wall.) 561 (1864);[20] *In re Sanborn*, 148 U.S. 222 (1893); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). Presented with such statutes, this Court has accepted the exercise of executive or legislative review, as well as the initial assignment of adjudicatory tasks to non-Article III decision-makers, and has held only that the availability of executive or legislative review precludes judicial review by Article III courts.[21] In the remaining cases

[20] In discussing *Gordon*, petitioners (Pet. Br. 17) and their amici (Amici Br. 16 & n.7) cite the opinion of Chief Justice Taney. Although that opinion has been cited with approval, see *Williams* v. *United States*, 289 U.S. 553, 564 (1933), it was "not the opinion of the Court." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 569 (1962) (plurality opinion). Chief Justice Taney's opinion was written before the Court heard reargument in *Gordon* and was not published at the time that *Gordon* was decided. *Ibid.* The Court subsequently published it as an addendum to the United States Reports. See 117 U.S. at 697. The opinion of the Court in *Gordon* was likewise unpublished at the time the decision was announced, but was subsequently reproduced in *United States* v. *Jones*, 119 U.S. 477, 478 (1886).

[21] See *United States* v. *Ferreira*, *supra* (federal court hearing claims for which United States was liable under treaty with Spain, whose decisions were subject to review by Secretary of the Treasury, was not exercising judicial power, and no appeal lay to Supreme Court); *Gordon* v. *United States*, *supra* (Court of Claims judgments, which may be paid only after Secretary of the Treasury estimates the claim, are not the exercise of judicial power); *In re Sanborn*, *supra* (Court of Claims' resolution of facts, rendered on referral

cited by petitioners that apply the logic of *Hayburn's Case*, the Court concluded that there was no provision for executive or legislative revision at all.[22]

None of those cases has application here. Section 27A(b) does not authorize review of merits adjudications in securities cases by executive or legislative officials. Nor has any executive or legislative official claimed the right to make such a determination.

from Executive Department and reported back to that Department, is not within class of cases that are by statute subject to Supreme Court review); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. at 112-114 (federal court may not review administrative order granting or denying application for foreign air route, where the President has final authority to approve or disapprove agency's action). See also *District of Columbia* v. *Eslin*, 183 U.S. 62, 65 (1901) (declining to review Court of Claims decision in light of intervening legislation providing that Congress would not pay the judgment).

[22] See *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641 (1874) (government could not reduce judicially determined debt by setting off a tax claim that it had waived by failing to assert as a counterclaim); *United States* v. *Waters*, 133 U.S. 208, 213 (1890) (award of counsel fees to district attorney by Court of Claims was "a judicial act of a court of competent jurisdiction [and] was not subject to the reexamination and reversal of the Attorney General"); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-401 (1934) (under statute defining its jurisdiction, Court of Claims, when hearing tax refund claim, is required to resolve all elements of the claim; it cannot render a judgment subject to later proof of one element to the Commissioner of Internal Revenue). *ICC* v. *Brinson*, 154 U.S. 447, 468-476 (1894) (court enforcement of ICC subpoena is an exercise of judicial power) (Pet. Br. 17), and *Williams* v. *United States*, 289 U.S. 553, 564 (1933) (Court of Claims judges are not covered by Article III prohibition against diminution of compensation) (Pet. Br. 18), have no bearing on the present issue.

Rather, Section 27A(b) provides for the reopening of cases for further review within the Judicial Branch. Unlike a statute that gives final authority to determine the outcome of a case to another Branch, Section 27A contemplates final resolution of federal securities claims by the courts. In sum, the limited right conferred by Section 27A(b) to have a final judgment reopened does not violate the separation of powers.

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Congress has chosen to impose a statutory time limit on appeals from civil judgments of district courts. See 28 U.S.C. 2107 (Supp. IV 1992).[23] In this case, the time limit expired at midnight on September 15, 1993, 30 days after the district court entered its judgment dismissing Pacific Mutual's federal claims against petitioners.[24] At that instant, according to petitioners, the Due Process Clause

[23] Currently, the general time limit for civil appeals is 30 days. 28 U.S.C. 2107(a) (Supp. IV 1992). The original time limit set by the First Congress in the Judiciary Act of 1789 was five years. Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84-85; see *The Dos Hermanos*, 23 U.S. (10 Wheat.) 306, 311 (1825).

[24] As noted above, the district court dismissed Pacific Mutual's state-law claims without prejudice, allowing Pacific Mutual to refile those claims in state court. See J.A. 1-2; Pet. App. B3. If the court had chosen to exercise its supplemental jurisdiction over the state claims (see 28 U.S.C. 1367 (Supp. IV 1992)), the time for Pacific Mutual to appeal the dismissal of the federal claims would not have begun to run, and the dismissal would not have been "final" for purposes of petitioners' due process theory, when Pacific Mutual moved to reinstate the federal claims under Section 27A(b).

transformed the district court's judgment into a "vested right" that Congress could not disturb. In petitioners' view, having enacted a statute limiting the time for review of the judgment, Congress could not enact another statute providing for the subsequent reopening of the judgment, without violating the Due Process Clause.

As we now show, that due process theory is incorrect. It rests on a concept of "vested rights" that cannot be reconciled with modern due process principles. And even if the view of "vested rights" expressed in the cases on which petitioners rely continues to have force, those cases show that an Act of Congress like Section 27A(b) does not impermissibly divest litigants of "vested rights."

A. The Due Process Clause Protects Property Interests, Not "Vested Rights"

1. Petitioners assert that they enjoy "vested property rights" in the judgment entered by the district court.[25] Pet. Br. 29. The concept of "vested

[25] It is worth noting the limited character of the right "vested" by the judgment in this case. Pacific Mutual's federal court action alleged common law fraud claims as well as statutory claims under Section 10(b). The district court dismissed the common law claims without prejudice, and those claims have since been refiled in state court. If Pacific Mutual prosecutes its common law claims successfully, petitioners will be exposed to much the same financial liability that they would have faced under the federal securities laws. Thus, taken on its own terms, the judgment does not purport to free petitioners from liability for fraud. Petitioners themselves claim only that the judgment gives them "freedom from the possibility of a *federal* claim." Pet. Br. 38 (emphasis added). None of the cases cited by petitioners establishes that a judgment that continues to expose the defendant to liability to the

rights," however, does not determine the limits on government action imposed by the Due Process Clause. The specific claim made by petitioners—that the Due Process Clause prohibits legislatures from disturbing "vested rights" in final judgments (Pet. Br. 29-49)—conflicts with the principles of this Court's due process jurisprudence.

The Due Process Clause provides that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." By its terms, the clause speaks of "life," "liberty," and "property," not "vested rights." See *Campbell* v. *Holt*, 115 U.S. 620, 628 (1885) ("[T]he word[s] 'vested right' [are] nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution."). Petitioners contend (Pet. Br. 29) that "vested rights" are a form of "property" for due process purposes. But they offer no general criteria, and the Due Process Clause supplies none, for deciding what rights are subject to "vesting" or how and when "vesting" occurs.

Even if it is assumed that "vested rights," however defined, constitute a form of "property" for purposes of the Due Process Clause, it does not follow that the Due Process Clause disables legislatures from disturbing them. On its face, the Due Process

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same plaintiff for the same underlying conduct creates a "vested right" of constitutional magnitude.

Clause does not prohibit deprivations of property at all; it merely requires that deprivations be accompanied by "due process of law." In the realm of social and economic legislation, due process demands only that the legislature pursue a legitimate public purpose and that the impact on private property interests be rationally related to the public ends of the law. See, *e.g.*, *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. at 2287 (citing cases).

By the same token, the Due Process Clause does not foreclose legislatures from affecting property interests even when the legislation acts retroactively. The burden of sustaining retroactive legislation under the Due Process Clause is "met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989). It may well be that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation." *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992). Nevertheless, "the test of due process" for the "retroactive aspects of [economic] legislation, as well as the prospective aspects," is whether they advance "a legitimate legislative purpose * * * by rational means." *Ibid.* Retroactive legislation that meets those standards satisfies the Due Process Clause "even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery*, 428 U.S. at 16; *Romein*, 112 S. Ct. at 1112; *Sperry*, 493 U.S. at 64-65.

Petitioners contend (Pet. Br. 35-38) that while the Due Process Clause may permit legislatures to dis-

turb other forms of property retroactively, it absolutely disables them from retroactively disturbing "vested rights." Quite apart from the absence of any constitutional text supporting that claim, the distinction itself is unsound. All retroactive legislation upsets expectation interests to some degree. When a legislature imposes monetary liability retroactively, and thereby compels an individual to assume liability that did not exist when the relevant acts occurred, see, *e.g.*, *Usery*, 428 U.S. at 17, it is surely impinging on the individual's "property." No different effect can be ascribed to legislation that retroactively regulates "vested rights."

Petitioners assert that "modern due process jurisprudence" (Pet. Br. 33), far from repudiating vested rights principles, continues to embody them. But while petitioners cite (Pet. Br. 33-37) numerous decisions of this Court for that proposition, most of the cited decisions did not consider claims under the Due Process Clause at all.[26] Although *Ettor* v. *City of*

[26] The Court's decisions in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935); *Armstrong* v. *United States*, 364 U.S. 40 (1960); *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982); *Hodel* v. *Irving*, 481 U.S. 704 (1987); and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), all involved claims arising under the Takings Clause. *Coombes* v. *Getz*, 285 U.S. 434 (1932), and *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), involve claims under the Contracts Clause. *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981), involved a claim under the Ex Post Facto Clause. *Asiatic Petroleum Co.* v. *Insular Collector of Customs*, 297 U.S. 666 (1936), and *Bradley* v. *School Board*, 416 U.S. 696 (1974), involved issues of statutory construction, not constitutional claims. And none of those cases involved a claim that a vested right in a judgment was impermissibly changed.

Tacoma, 228 U.S. 148 (1913) (Pet. Br. 36), did involve a due process claim, its holding—that a State cannot repeal a statutory cause of action *pendente lite*—hardly represents a "modern" view of due process and is of doubtful validity today. Cf. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established that [a] person has no property, no vested interest, in any rule of the common law."). And *United States* v. *Darusmont*, 449 U.S. 292, 299 (1981) (per curiam), rejected a due process attack on a retroactive income tax statute; it did not endorse a theory of "vested rights."

Any suggestion that rights "vested" by a final judgment lie beyond the regulatory authority of Congress cannot be squared with this Court's decision in *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). In that case, landlords obtained valid state court judgments of eviction during a gap in the application of federal price control statutes. *Id.* at 101-102. When the price controls were reinstated, federal law made them retroactive and precluded evictions under the prior judgments. *Id.* at 102 n.3. Relying, as petitioners do here, on the theory that "the vested rights, created by the prior judgments * * * could not be destroyed by subsequent legislation," the landlords claimed that the law violated the Due Process Clause. *Id.* at 102. This Court rejected the claim that "vested rights" in "valid judgments" were immune from regulation:

> So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through fore-

> handed contracts. * * * The rights acquired by judgments have no different standing.

Id. at 107. See also *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958) (*Fleming* holds that "any 'vested' rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power").

If petitioners were correct in claiming that due process places rights "vested" in a judgment beyond government control, Fed. R. Civ. P. 60(b) would be constitutionally suspect. Rule 60(b) sets forth a variety of grounds that justify reopening of otherwise final judgments, and courts have exercised that reopening power in light of changes in the law. See *Adams* v. *Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989).[27] This Court as well has reopened a final judgment, when a change in legal terrain rendered the prior judgment inequitable. See *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam) (granting second petition for rehearing, filed four Terms after certiorari had been denied, because of a change in decisional law governing eligibility for compensation, and because other victims of the same accident had won compensation awards in other courts). On petitioners' theory, the Constitution prohibits those inter-

[27] Petitioners note (Pet. Br. 48 n. 53) that many courts have declined to reopen a decision because of a change in the law. But they suggest no basis for believing that courts could not reopen particular cases for that reason, or that Congress could not amend Rule 60(b) to make that an express ground for reopening—especially where, as here, the change in the law operates to restore the law to what it was when the suit was filed.

ferences with "vested rights." Petitioners suggest (Pet. Br. 49) that the fact that courts can reopen final judgments does not justify similar action by the legislature. But the Due Process Clause is a general constraint on government action; it applies both to the courts and to Congress. If the Due Process Clause does not rigidly bar the reopening of judgments by courts, it does not rigidly bar reopenings under standards enacted by Congress.

2. Under the due process standards that govern review of economic legislation, Section 27A(b) is plainly constitutional. Section 27A as a whole is designed to protect the legitimate reliance interests of securities fraud plaintiffs who filed suit before this Court's decision in *Lampf* and whose actions were timely under the limitations periods in effect in their jurisdictions. Congress acted to prevent the manifest unfairness that would result if the change in the limitations period brought about by *Lampf* were applied "to those cases that were pending at the time that the decision came down." 137 Cong. Rec. S18,623-S18,624 (daily ed. Nov. 27, 1991) (Sen. Bryan). Congress was also concerned about the adverse impact of *Lampf* upon private enforcement of the securities laws.[28] Those goals are unquestionably legitimate ones, and Section 27A(b) is directly tailored to advance them.

[28] *See Securities Investor Protection Act of 1991: Hearing on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 2 (1991) (Sen. Bryan); *id.* at 15-16 (Richard C. Breeden, Chairman, SEC); *Securities Investors' Legal Rights: Hearing on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 38-39 (1991) (Rep. Markey and Chairman Breeden); *id.* at 21-24 (Chairman Breeden).

At the same time, given the circumstances surrounding the enactment of Section 27A(b), petitioners cannot plausibly claim that the statute prejudices any legitimate reliance interests on their part. Before this Court's decision in *Lampf*, the law of the Fifth Circuit, where this suit arose, made clear that claims under Section 10(b) of the Exchange Act were governed by state limitations periods. Far from disrupting settled expectations concerning the applicable limitations period, Section 27A gives effect to those expectations. When the Court retroactively mandated the application of a "1-and-3" rule in *Lampf* and *Beam*, Congress acted promptly to restore the pre-*Lampf* rule, enacting Section 27A in less than six months and requiring motions for reinstatement to be filed within 60 days. In this case, only a few months passed between the district court's dismissal of the Section 10(b) claims and the enactment of Section 27A. Under these circumstances, petitioners cannot (and, in any event, do not) maintain that they acted in reliance on the dismissal order, to the prejudice of their defense on the merits. Section 27A(b) thus does not pose the "problems of unfairness," *Romein*, 112 S. Ct. at 1112, that sometimes accompany retroactive legislation.[29]

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[29] Even if defendants could show in a particular case that they had relied on the finality of dismissal orders, it would not follow that Section 27A(b) is unconstitutional. This Court's due process decisions do not condition the constitutionality of retroactive legislation on an absence of reliance by the affected parties. See, *e.g.*, *Usery*, 428 U.S. at 16 (retroactive legislation that satisfies rational basis test is not unconstitutional even if it "upsets otherwise settled expectations").

At several points in their brief (*e.g.*, Pet. Br. 29, 36, 38), petitioners imply that Section 27A(b) violates not the Due Process Clause, but the Takings Clause of the Fifth Amendment instead. Petitioners did not invoke the Takings Clause below, nor does their petition for certiorari present the question whether Section 27A(b) violates the Takings Clause. See Pet. i. As a result, the issue is not properly before this Court. See *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam); *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531-1534 (1992). In any event, "[g]iven that [petitioners'] due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause." *Concrete Pipe & Products of California, Inc.*, 113 S. Ct. at 2289, quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).

All that has been "taken" from petitioners by Section 27A(b) is the "right," fortuitously bestowed by *Lampf* and *Beam*, not to litigate Pacific Mutual's federal securities claims. The financial burden of litigation is hardly the kind of deprivation that entitles litigants to compensation under the Takings Clause. See *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam) (litigation expenses are not part of just compensation); cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."). The Takings Clause would not entitle petitioners to compensation by the federal government even if they are found to have violated the federal securities laws and are ultimately required to pay damages to Pacific Mutual. In that event,

the damages would be due to fraudulent acts that were illegal when committed and that gave rise to liability under already-existing federal laws. Reimposing liability to injured persons for actions that were tortious and unlawful when taken can hardly constitute a "taking" of "property" within the meaning of the Takings Clause. The object of that provision is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. at 227 (citation omitted). There is "no constitutionally compelled reason to require the Treasury to assume the financial burden," *id.* at 228, for the fraud, if any, committed by petitioners.

B. The "Vested Rights" Doctrine, Even If It Has Continuing Significance, Does Not Invalidate Section 27A(b)

As the foregoing discussion demonstrates, the Due Process Clause does not create a special category of "vested rights" in a judgment that are immune from congressional regulation. But even if this case were analyzed under the precedents cited by petitioners in support of the existence of a "vested rights" doctrine, Section 27A(b) passes constitutional muster.

As an initial matter, a judgment that rests on the statute of limitations, rather than an adjudication on the merits, does not vest any property rights of a character that bars further pursuit of the claim if procedures are made available for that purpose. Where a case is dismissed solely because it is time-barred under then-governing law, the creation of an avenue for adjudication of the merits "is not a case of an attempt retroactively to create a liability in

relation to a transaction as to which no liability had previously attached." *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931). In *Graham & Foster*, for example, the Court rejected a "vested rights" due process challenge to a statute that restored liability for taxes after the statute of limitations had run. Petitioners are in no better position to assert a "vested rights" claim simply because a court entered a judgment based on a statute of limitations defense. See *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983) (final dismissal of claimant's quiet title action against the United States on the ground that limitations period had expired would not divest the claimant of whatever property rights it possesses, which may be asserted in another proceeding).

Petitioners quote (Pet. Br. 30) the statement in *McCullough* v. *Virginia*, 172 U.S. 102, 123 (1898), that "[i]t is not within the power of the legislature to take away rights which have been once vested by a judgment." But despite the breadth of that language, this Court has not foreclosed such legislative action in the unqualified fashion suggested by *McCullough*.[30] To the contrary, the Court has

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[30] Indeed, *McCullough*'s application of the "rule" described in the quoted statement to a trial court judgment that was on appeal conflicts with this Court's decisions, both before and since. In *McCullough*, the Court reviewed a Virginia law that rescinded the right of a bondholder to use coupons to pay state taxes, and instead required taxes to be paid in cash. 172 U.S. at 103-105, 122. The bulk of the Court's opinion sustained the bondholder's claim that the right to use the coupons was protected from state impairment by the Contract Clause of the Constitution, Art. I, § 10, Cl. 1. 172 U.S. at 109-123. The language on which petitioners rely appears in

upheld a wide range of federal and state statutes that have divested litigants of the benefits of final judgments. See, *e.g.*, *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940); *Hodges* v. *Snyder*, 261 U.S. 600, 603-604 (1923); *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 477-478 (1899); *Freeland* v. *Williams*, 131 U.S. 405, 417-421 (1889); *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855). When the Court has cited *McCullough* in subsequent decisions, it has usually done so in the course of sustaining, rather than invalidating, legislation disturbing final judgments. See, *e.g.*, *Hodges* v. *Snyder*, 261 U.S. at 603. In short, *McCullough*'s "rule" that legislatures may not "take away rights which have been once vested

a section of the opinion that rejected the claim that the bondholder's action had to be dismissed because after the judgment was rendered in the trial court, and the case was on appeal, Virginia repealed the "statute authorizing this particular form of suit." *Id.* at 123. This Court's statement that the legislature cannot repeal the right to sue while a case is pending on appeal from a judgment conflicts with the recognition in *The Schooner Peggy*, 5 U.S. (1 Cranch) at 110, that "a court must decide [a case] according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside." See also *Rafferty* v. *Smith, Bell & Co.*, 257 U.S. 226 (1921) (applying statute, enacted while case was on appeal, that eliminated tax refund claim). Modern cases recognize the same rule. See, *e.g.*, *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 712 (1974). The result in *McCullough* can be explained, however, as protecting the bondholder's right to enforce a contract with the State against state impairment by the withdrawal of a remedy.

by a judgment" has been honored most often in the breach.[31]

Petitioners concede (Pet. Br. 40-44) that *McCullough*'s nominally unqualified rule is, in fact, subject to a variety of exceptions. But they contend that Section 27A(b) does not come within any of the exceptions recognized by this Court. That claim is incorrect. This Court has squarely held that the "vested rights" doctrine does not invalidate legislation, like Section 27A(b), that directs the reopening and re-

[31] Petitioners characterize several subsequent decisions of this Court as "approv[ing] the *McCullough* doctrine." Pet. Br. 31. Those cases, however, do not assist petitioners. *Hodges* v. *Snyder*, *supra*, and *Stephens* v. *Cherokee Nation*, *supra*, involved legislation affecting final judgments, but they distinguished *McCullough* rather than relied on it. *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922), and *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370 (1932), did not involve final judgments at all. *Forbes* held only that a State could not retrospectively ratify the collection of tolls for passing through a canal when no tolls were due at the time. *Arizona Grocery* held that the Interstate Commerce Commission could not retroactively declare a rate to be unreasonable after having itself prescribed the rate; the decision did not turn on the Due Process Clause. Petitioners also err in contending (Pet. Br. 32) that *Stewart* v. *Keyes*, 295 U.S. 403, 416-417 (1935), involved "legislation analogous to Section 27A(b)." *Stewart* did not involve a final judgment. Moreover, the Court's holding—that it violated due process for a statute to revive a time-barred cause of action—is limited to the revival of otherwise time-barred suits "to recover real or personal property" from the titleholder. 295 U.S. at 417. That holding, even assuming it to be good law, see note 33, *infra*, has no application where title to real or personal property is not involved. See *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945) (rejecting due process attack on a statute lifting the bar of the statute of limitations in a pending securities fraud action).

examination of final judgments, even when the legislation is enacted after the judgments have become final and the reexamination results in a judicial reversal of the original judgment. *Paramino Lumber Co.* v. *Marshall*, 309 U.S. at 374-379; *Stephens* v. *Cherokee Nation*, 174 U.S. at 475-478; *Freeland* v. *Williams*, 131 U.S. at 416-421. And the Court has sustained such legislation not only when it provides for reexamination under the substantive legal standards that applied at the time of the original judgments, but also when it requires the application of new rules of decision.

In *Freeland*, for example, a land owner obtained a money judgment against a soldier who stole cattle during the Civil War. 131 U.S. at 406. In 1867, the Supreme Court of West Virginia affirmed the judgment, which rejected a defense based on the soldier's status as a belligerent. *Id.* at 407-408. In 1872, before the land owner had executed the judgment, West Virginia amended its constitution to provide that no person "shall be liable in any proceeding, * * * nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered," for military actions that were consistent with "the usages of civilized warfare" during the Civil War. *Id.* at 411.

The defendant in *Freeland*, invoking the new law, brought a bill to enjoin execution of the plaintiff's final judgment. 131 U.S. at 407-409. The plaintiff challenged the constitutionality of the law, raising the same kind of "vested right" argument that petitioners are advancing here:

> The proposition of the plaintiff * * * is, that by the judgment of the [trial court] he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the State which prevents his enforcing that judgment * * * is depriving him of property without due process of law * * *. This right of the plaintiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.

Id. at 417. This Court rejected the vested right claim and sustained West Virginia's power to annul the final judgment. *Id.* at 417-421. The Court explained that "[j]udgments, however solemn, however high the court which rendered them, and however conclusive in a general way between the parties," may constitutionally be "subject[ed] to review, to reconsideration, to reversal and to modification by various modes," such as writs of error and bills of review. *Id.* at 418. The Court further held that the legislature could retroactively "remov[e] objections and obstructions" to such review procedures, even when the "objections and obstructions" consisted of the substantive legal rules that supported the original judgment. *Id.* at 419-420.

In concluding that due process of law did not preclude the expansion of opportunities for review of a judgment, even after the judgment became final, the Court stated that "[p]rior to the adoption of the 14th Amendment the power to provide such remedies, although they have interfered with what were called vested rights, seems to have been fully conceded." *Freeland*, 131 U.S. at 420 (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *Satterlee* v. *Matthewson*, 27 U.S. (2 Pet.) 380 (1829); *Sampeyreac* v. *United States*, *supra*; *Watson* v. *Mercer*, 33 U.S. (8 Pet.) 88 (1834); and *Freeborn* v. *Smith*, 69 U.S. (2 Wall.)

160 (1864)). In *Watson*, the Court upheld a state statute that validated a deed, even though a prior final judgment had ruled the deed to be void. 33 U.S. (8 Pet.) at 89, 108-111. *Freeland* concluded that the longstanding acceptance of such statutes was not called into question by the ratification of the Fourteenth Amendment. 131 U.S. at 420.

The Court relied on the same reasoning in *Stephens*, a case decided after this Court's intervening statement in *McCullough*, 172 U.S. at 123, that legislatures may not "take away rights which have been once vested by a judgment." In *Stephens*, individuals obtained decrees of Indian citizenship from the United States Court for the Indian Territory. 174 U.S. at 476. The statute under which the suits were brought provided that "the judgment of the court shall be final." *Ibid.* After the judgments were entered, Congress enacted legislation permitting the losing parties to reopen the judgments by appealing them to this Court. *Id.* at 476-477. The individuals who had prevailed in the trial court attacked the retroactive legislation on the ground, *inter alia*, that it was "destructive of vested rights." *Id.* at 477. Citing *Freeland*, this Court summarily rejected that contention, stating that "the grant of a new remedy by way of review has been often sustained under particular circumstances." *Id.* at 478. The court dismissed the vested rights doctrine as inapposite where "the right asserted to be vested is only the exemption of the[] judgments from review." *Ibid.*

The Court applied the same principles again in *Paramino*. There, a federal agency issued a judgment denying compensation to a longshoreman under the Longshoremen's and Harbor Workers' Compensa-

tion Act.[32] 309 U.S. at 374-375. The longshoreman did not seek review of the judgment, which by statute became final 30 days later. *Id.* at 375. Five years later, Congress enacted a private bill "ordering the Compensation Commission to review [the] case and to issue a new order, the provisions in the Compensation Act limiting time for reviewing awards 'to the contrary notwithstanding.'" *Ibid.* The defendant employer argued that the legislation violated the Due Process Clause. *Id.* at 377. Relying on *McCullough*, the defendant contended that "[t]he compensation award was a final adjudication vesting property rights" that were "not alterable by subsequent legislation." *Id.* at 372. This Court rejected the invocation of *McCullough*, reasoning that "the immunity obtained by the lapse of the time for review is [not] the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim." *Id.* at 378.[33]

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[32] The agency determined that the longshoreman was entitled to a limited measure of compensation, but that his employer already had paid him the full amount due. 309 U.S. at 375.

[33] *Paramino*'s treatment of "the immunity obtained by the lapse of the time for review" parallels this Court's treatment of legislation that retroactively extends a statute of limitations. As a general matter, the Court has held that the Due Process Clause does not prohibit legislatures from retroactively reviving claims that have become barred by the running of a statute of limitations. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945); *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976). Just as the running of the limitations period does not give the defendant a "vested right" against legislation reviving the right to sue (*Chase*), so the running of a statu-

Section 27A(b) plays precisely the same role as the legislation upheld in *Freeland*, *Stephens*, and *Paramino*. In this case and others governed by Section 27A(b), the losing party failed to seek review of an adverse judgment within a statutory time limit imposed by the legislature, and the judgment became final as a result. Congress thereafter enacted legislation providing for further review by the courts, notwithstanding the finality of the original judgment, and it provided for the courts to apply a new rule of decision when doing so. This Court's decisions confirm the constitutionality of Section 27A(b) in each of these respects. They show that the "vested rights" doctrine does not foreclose the legislature from directing review after the statutory time for review has already run and the judgment has become final (*Paramino*), or from retroactively creating a review procedure that did not previously exist (*Stephens*). And they show that the legislature may direct the courts to reexamine their judgments not only to determine their correctness under the law that existed at the time the judgment was entered, but also to take account of subsequent, retroactive changes in the substantive rules of decision (*Freeland*). In sum, Section 27A(b) does nothing that this Court has not already sustained in *Freeland*, *Stephens*, and *Paramino*.

Petitioners argue (Pet. Br. 40, 43-44), however, that *Freeland*, *Stephens*, and *Paramino* are inapplicable because they did not involve the judgments of Article III courts. But none of those decisions

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tory time limit on appeal does not give the defendant a "vested right" against subsequent legislation reviving the right to review of the judgment (*Paramino*).

grounded its vested rights analysis in the non-Article III character of the tribunal that issued the original judgment.[34] Moreover, even if decisions of non-Article III federal tribunals, such as administrative agencies, were somehow assumed not to give rise to "vested rights," but cf. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966), petitioners could not make that claim about the judgments of state courts, such as the court in *Freeland*. Petitioners offer no reason why the Due Process Clause should be held to accord the judgments of state courts any less protection than those of federal courts. *McCullough* itself, the case on which petitioners ground their vested rights claim, involved a state court judgment.

Petitioners attempt to distinguish *Freeland*, claiming (Pet. Br. 40, 44) that the original judgment in *Freeland* was not shielded by the Due Process Clause because it was a "void judgment." This Court, however, reached precisely the opposite conclusion: "the judgment * * * is *prima facie* a *valid* judgment." 131 U.S. at 417 (emphasis added). As for petitioners' suggestion (Pet. Br. 44) that *Freeland* turned on the purpose of quieting strife following the Civil War, they confuse West Virginia's reasons for enacting the new law with this Court's reasons for sustaining it. The Court's reasoning in *Freeland* rests squarely on the authority of legislatures to subject final judgments to further review by the courts; it

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[34] For example, in *Paramino*, this Court's due process analysis, 309 U.S. at 377-379, makes no reference to the fact that the original judgment had been issued by an administrative agency rather than an Article III court. In marked contrast, the Court did invoke the administrative nature of the tribunal in disposing of a separation of powers argument. See *id.* at 381 & n.25.

does not purport to frame a "quieting strife" exception to the vested rights doctrine. See 131 U.S. at 418-420. Finally, the suggestion (Pet. Br. 44) that *Freeland* was overruled *sub silentio* by *McCullough* is refuted by the fact that this Court has continued to cite *Freeland* as authority even after *McCullough*, for precisely the exception to the "vested rights" doctrine that applies here. See *Stephens*, 174 U.S. at 478.

In sum, Section 27A(b) is indistinguishable for due process purposes from the statutes upheld in *Freeland*, *Stephens*, and *Paramino*. It therefore meets the requirements of the Due Process Clause regardless of whether this Court treats the "vested rights" doctrine as a constitutional anachronism or, instead, as an aspect of current due process analysis.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. III 1991), provides:

> (a) *Effect on Pending Causes of Action.*—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) *Effect on Dismissed Causes of Action.*—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
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> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.